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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and REGAL TUBE COMPANY,

Petitioners,

v.

INDEPENDENCE TUBE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT IN OPPOSITION TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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I. Introduction

At the Court's invitation, the Solicitor General has filed a brief setting forth the government's view that the petition for a writ of certiorari should be granted in this case with respect to the first question presented by the petition, *i.e.*, whether affiliated corporations are capable of engaging in a "contract, combination . . . or conspiracy, in restraint of trade" under Section 1 of the Sherman Act (15 U.S.C. § 1).

The government acknowledges that the second question presented by the petition, whether injury to competition was established, does not warrant review. (Brief of United States as Amicus Curiae, at 3-4 n.8; hereinafter "GB"). Thus, the government concedes that the activities of petitioners here resulted in an unreasonable restraint of trade to the ultimate detriment of consumers. Yet, in the current administration's zeal for retrenchment of antitrust enforcement, it urges the Court to create a new rule of law holding that such an unreasonable restraint of trade is lawful under the antitrust laws.

The government's quarrel is not with the lower court's decision in this case, but with the numerous and consistent holdings of this Court on the parent-subsidiary issue throughout the 93 year existence of the Sherman Act. The Solicitor General's brief asks the Court to overrule at least four of its decisions over the past 35 years. (GB, at 8-11, 22) Contrary to the government's assertions, those decisions are in complete accord with congressional intent and are not a source of confusion or inefficiency. Moreover, the government's current view is a complete repudiation of the position consistently implemented for many decades by both the Justice Department and the Federal Trade Commission. The creation of such a rule reducing Sherman Act coverage would be a radical departure from national antitrust policy which could only be mandated by Congress.

II. The Government's Position Contravenes Congressional Intent.

As the government recognizes, "concerted conduct is prohibited under Section 1 whenever it constitutes an unreasonable restraint of trade . . . ." (GB, at 4) The government argues, however, that "concerted conduct" should *never* be found to exist between parent and subsidiary corporations. This assertion is based upon the erroneous and unsupported notion that a

parent and subsidiary should *always* be regarded as a single economic unit for Sherman Act purposes regardless of how autonomously they operate. The government's argument is without legal foundation or logical support.[1]

Without citation to any legislative history, the government contends that the statutory scheme of the Sherman Act supports its position. Thus, the government argues that Section 1 is concerned with "concerted conduct" while Section 2 is concerned with "unilateral" action, and that parent-subsidiary actions should always be considered unilateral conduct. (GB, at 4-6) The government's argument is in conflict with legislative history and with the consistent holdings of this Court and all lower courts that parent-subsidiary actions can constitute "concerted conduct." Moreover, the "statutory scheme" of the Sherman Act does not support the government's position. Sections 1 and 2 of the Sherman Act are *both* concerned with concerted activity. While Section 2 is *also* concerned with individual monopolistic conduct, it is not so limited.[2] Thus, in their fervor to persuade the Court to imbed into antitrust law an economic notion currently in vogue with some individuals in the Antitrust Division, the proponents seek to rewrite the Sherman Act and its legislative history.

In adopting Section 1 of the Sherman Act, Congress clearly intended to prohibit unreasonable trade restraints perpetrated by affiliated corporations. Thus, Congress specifically identified the commonly-owned corporations of the commercial trusts to

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[1] The government's notion is also dubious as an economic proposition. For purposes of economic analysis, the term "economic unit" is defined as "a firm *or subunit of a firm* that has sufficient resources and autonomy to act on its own behalf in the market place." R. RUMELT, STRATEGY, STRUCTURE AND ECONOMIC PERFORMANCE 33 (1974) (emphasis added).

[2] Section 2 of the Sherman Act prohibits monopolization or activities of a person to "combine or conspire with any other person or persons to monopolize . . . ," (15 U.S.C. § 2)

be within the intended purview of the statute.[3] Moreover, in perhaps the first case to arise under Section 1 of the Sherman Act challenging the conduct of a parent and its subsidiaries, this Court held that corporations affiliated through common ownership were covered by Section 1 of the Act. *Northern Securities Co.* v. *United States*, 193 U.S. 197, 327 (1904). (*See generally* Respondent's Brief in Opposition, at 9.)

Until today, federal antitrust authorities have consistently concluded that conspiracies between parents and subsidiaries can have serious anticompetitive consequences. Indeed, the parent-subsidiary cases in this Court were largely initiated by the United States.[4] Since 1955, the Report of the United States Attorney General's National Committee to Study the Antitrust Laws has been the touchstone of the government's position on this issue.[5] During those twenty-eight years, the Antitrust Division has filed numerous actions alleging Sherman Act conspiracies between affiliated corporations. In *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975), former Solicitor General (now Judge) Bork fervently supported this Court's holdings on the parent-subsidiary issue when he argued

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[3] Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & Econ. 7, 21-22 (1966). *See also* 21 CONG. REC. 2457 (1890) (Statement of Senator Sherman), *reprinted in* E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 116-18 (1978).

[4] *See, e.g., United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947); *United States* v. *Griffith*, 334 U.S. 100 (1948); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975). *See also Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1 (1911); *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904).

[5] That Report concluded that "concerted action between a parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by Section 1 . . . ." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 34 (1955).

to this Court on behalf of the government that it is improper "to ignore the separate corporate identities of independent firms and permit them to evade liability on the claim that they are a single entity." Brief For The United States, at 28.

In furtherance of this enforcement policy, criminal actions have been filed in appropriate circumstances. *See, e.g., United States* v. *Cotton Baking Co.*, 513 F. Supp. 223 (M.D. La. 1981). Indeed, even the present Antitrust Division recently filed two actions which named affiliated corporations as co-defendants and co-conspirators. *United States* v. *Cambridge-Lee Industries, Inc.*, No. 83-00107 (E.D. Pa. filed March 18, 1983); *United States* v. *Danilow Pastry Co., Inc.*, No. 82 Civ. 3696 (S.D.N.Y. filed June 4, 1982), *proposed consent decree filed* April 5, 1983, *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,832.

Assistant Attorneys General in charge of the Antitrust Division have unequivocally supported the Attorney General's Report. For example, in 1967 in connection with the filing of *United States* v. *General Tire & Rubber Co.*, Civil No. 67-155 (N.D. Ohio filed March 2, 1967), Assistant Attorney General Donald F. Turner stated:

> [A]s the law has developed in this area it has been thought appropriate to apply the conspiracy concept to the activities of a group of closely related corporations where the conduct involved is beyond defense and involves coercion of outsiders.[6]

In 1971, Assistant Attorney General (later Judge) Richard W. McLaren set forth the Antitrust Division's enforcement position in similar terms:

> The Department of Justice has adopted a policy of using the intra-enterprise conspiracy doctrine to challenge,

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[6] Interview with Donald F. Turner, Assistant Attorney General, Antitrust Division, 34 Antitrust L.J. 113, 123 (1967).

> under Section 1 of the Sherman Act, practices engaged in by commonly-controlled firms only where the practice has a coercive or restrictive effect on outsiders.
>
> * * * *
>
> [W]e have limited our use of the intra-enterprise doctrine to situations in which the commonly-controlled firms have pooled their power in a manner which has adverse competitive effects on independent business entities. See, *e.g., United States* v. *General Tire Co., et al.*, D.C.N.D. Ohio, Civil Action No. C-67-155. Such an application of the doctrine is consistent with the facts of the leading Supreme Court decisions. Such an approach is also consistent with the analysis of the case law made by the *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955) p. 34.[7]

The Justice Department's Antitrust Guide for International Operations, adopted in 1977, reaffirmed the Department's long-established view that the Sherman Act applies to "coercive attempts by members of a corporate group to drive third parties out of business or out of markets." UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 12 n.26 (1977).

The government does not now contend that there is any new empirical knowledge or other information which should cause Congress, the administration or the Court to reverse its position. The arguments set forth by the government are the same arguments considered and rejected by this Court in its prior holdings. Indeed, the current administration's position is largely based on its novel and unsupported view of the statutory scheme of the Act as adopted in 1890. The only change is the identity of the assistant attorney general, who is now requesting the Court to establish a rule of *per se* lawfulness

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[7] Letter from Richard W. McLaren, Assistant Attorney General, Antitrust Division, to Board of Governors of the Federal Reserve System, *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,122, 55,197 (Feb. 22, 1971) (footnote omitted).

for unreasonable trade restraints perpetrated by related corporations. Such a rule would forever remove the discretion of government enforcement agencies to initiate actions to protect the public interest in this area and would deprive private parties injured by such unreasonable restraints of the protection of the antitrust laws.

Ironically, this case clearly exemplifies the type of parent and subsidiary conduct which has been of concern to antitrust enforcers and to the courts. Here, Regal was acquired by Copperweld as a going business in a market in which Copperweld was not involved. Thereafter, Regal retained virtually total control of its operations, functioning as a separate decision-maker, with its own customer and supplier relationships independent of its parent. The separate business relationships maintained by each company permitted them to combine their economic leverage to exclude Independence from the market. The Antitrust Division and the courts repeatedly have held in such cases, that where "commonly-controlled firms have pooled their power in a manner which has adverse competitive effects on independent business entities", Section 1 is applicable. McLaren letter, *supra* note 7, at 55,197. *See also William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1055 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 57 (1982).

III. Exemption of Parent-Subsidiary Conduct from the Sherman Act Could Only Be Granted By Congress.

The government contends that freeing parent-subsidiary behavior from Section 1 of the Sherman Act would not really be an antitrust exemption but a reinterpretation of the statute similar to this Court's action in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). (GB, at 22) The government's analogy is inapt. *Sylvania* did not involve the question of whether certain practices were covered by the Sherman Act, but whether such practices should be analyzed under a rule of reason or a *per se* approach. Here, the government urges the Court to abandon altogether application of the Sherman Act to parent-subsidiary conduct and to exempt such conduct regard-

less of its adverse effects on competition. This Court has repeatedly held that such major reversals of antitrust law and policy can only be made by Congress. Indeed, as the Court recently stated in *Arizona* v. *Maricopa County Medical Society*, 102 S.Ct. 2466, 2478-79 (1982) (footnote omitted):

> By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application . . . we enhance the legislative prerogative to amend the law . . . .Congress may consider the exception that we are not free to read into the statute.

See also Illinois v. *Abbott & Associates, Inc.*, 51 U.S.L.W. 4311, 4314-15 (U.S. March 29, 1983); *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 51 U.S.L.W. 4275, 4280-81 (U.S. March 21, 1983).

Here the government would have the Court implant its novel economic view into the antitrust laws. This Court has emphasized the "inappropriateness of judicial resolution" in such cases where competing public policy considerations and differing economic theories must be weighed. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 646-47 (1981).

IV. The Parent-Subsidiary Conspiracy Doctrine is Sound Antitrust Policy.

Section 1 of the Sherman Act refers to contracts, combinations and conspiracies, thus requiring concerted action by two or more "persons." Section 8 (15 U.S.C. § 7) defines "person", *inter alia*, as a corporation. It is clear from the legislative history that Congress considered "[e]ach corporation . . . a creature by itself."[8] Thus, the threshold question in a Section 1 case is whether the alleged conspirators are separate persons.[9] However, separate legal status is simply the begin-

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[8] 21 CONG. REC. 2571 (1890) (Statement of Senator Teller), *reprinted in* E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 182 (1978).

[9] *See, e.g., Green* v. *Associated Milk Producers, Inc.*, 692 F.2d 1153, 1156-57 (8th Cir. 1982); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203, 205-06 (5th Cir. 1969).

ning, not the end, of the inquiry. Separate legal persons have been held capable of combining only where they are also functionally separate.

For example, even though an individual corporate employee is a separate legal person, the courts have recognized that since a corporation can act only through its employees, the two legal persons are not functionally separate. However, where the employee acts on his own behalf, outside the scope of his employment, he is operating as a separate person from his employer, and he does have the capacity to conspire with his employer.[10] In contrast, unincorporated divisions are not separate legal persons. Therefore, the initial statutory requirement is not met. Accordingly, courts have uniformly held that divisions lack the capacity to conspire without further inquiry into their functional separateness.

Corporate subsidiaries are separate legal entities. However, as with employee-employer relationships, courts look beyond legal formality to the functional separateness of the parent and subsidiary. Only where, as here, the subsidiary operates as a separate economic unit distinct from the parent have the courts found a capacity to conspire.[11]

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[10] *See Holter* v. *Moore and Co.*, 1983-1 Trade Cas. (CCH) ¶ 65,286, 69,689 n.8 (10th Cir. 1983); *Greenville Publishing Co.* v. *Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974).

[11] *See, e.g., Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). The government acknowledges that petitioners' claim of conflict among the circuits based on a selective and artificial classification of the cases is incorrect. The government asserts only that cases in two circuits appear to hold "without qualification" that affiliated firms can conspire. (GB, at 12-13) Review of these circuits' opinions does not support the government's contentions. *See, e.g., Battle* v. *Liberty National Life Insurance Co.*, 493 F.2d 39, 44 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110

(Footnote continued on following page)

In addition to functional separateness, the courts require a showing that the affiliated corporations acted to restrain the trade of third parties and not merely to affect the relationship between themselves. *See, e.g., General Business Systems* v. *North American Philips Corp.*, 699 F.2d 965, 980 (9th Cir. 1983).[12] The government argues that impact on third parties is irrelevant to the determination of whether there is a plurality of actors. (GB, at 15-16) Yet, it is this very inquiry which addresses the concern expressed by the government regarding the freedom of business to organize in an efficient way. This analysis balances internal organizational concerns with the protection of free markets by finding no conspiratorial capacity where the conduct in question deals with the relationship between the affiliated firms. *United States* v. *Citizens & Southern National Bank, supra.* The government does not

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(Footnote continued from preceding page)

(1975) ("the alleged facts tend to establish" that the affiliated defendants were "operationally two separate organizations."); *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 34 n.49 (3d Cir.), *cert. denied,* 439 U.S. 876 (1978) (court distinguishes between "internal management" and concerted action that "erects barriers to entry by another firm"). The government also ignores the most recent decisions dealing with the parent-subsidiary issue, which evidence a growing consensus among the circuits. *See, e.g., General Business Systems* v. *North American Philips Corp.*, 699 F.2d 965, 980 (9th Cir. 1983); *White* v. *Hearst Corp.*, 669 F.2d 14, 15-16 (1st Cir. 1982).

[12] The government without citation raises the false spectre of *per se* illegality resting solely on the separate incorporation of affiliated entities. In fact, the courts do not apply a *per se* rule to the joint conduct of affiliated firms. If a parent and subsidiary were unable to effect a restraint of trade through their combined efforts, there would be no violation. Thus, the government's purported concern over possible misapplication of the Sherman Act is without substance. *See Thomsen* v. *Western Electric Co.*, 680 F.2d 1263 (9th Cir.), *cert. denied,* 103 S.Ct. 348 (1982); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir.), *cert. denied,* 103 S.Ct. 57 (1982); *Reisner* v. *General Motors Corp.*, 671 F.2d 91 (2d Cir.), *cert. denied,* 103 S.Ct. 130 (1982).

suggest that Copperweld's legitimate goals for incorporating Regal included driving Regal's competitors out of business. Thus, this Court's holdings do not inhibit organizational efficiency.

The current rule of reason analysis is the antithesis of the *per se* approach urged by the government which would shield all anticompetitive activity of a parent and subsidiary from Sherman Act coverage. The government would have this Court determine antitrust policy on the basis of percentages of paper ownership rather than economic realities. Such an approach improperly elevates form over substance by ignoring the operational independence of the corporate actors.[13]

Adoption of the government's proposed exemption would unleash the very kind of anticompetitive behavior and injury to competition that Congress has sought to prevent, without any measurable benefits to the consumer. In this case, for example, the petitioners' joint efforts resulted in a substantially adverse impact on competition, inflated prices and decreased product supply. It is this kind of activity that the government urges this Court to sanction through granting the petition in this case.

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[13] The present standard does recognize the extent of ownership as an appropriate factor for consideration, but not as the sole factor as urged by the government. Indeed, in stark contrast to the position urged by the present leadership of the Justice Department, the government set forth the correct standard in its brief to this Court on behalf of the United States in *Citizens & Southern:*

> In determining whether, for purposes of [the Sherman] Act, corporations are independent entities or mere corporate shells or divisions of the same entity, this Court has looked to the fundamental policies being vindicated as well as the indicia of corporate independence.

Brief For The United States, at 30.

V. Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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